

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

**WEST AGRO, INC., d/b/a DELAVAL
MANUFACTURING**

Employer

and

Case 32-RC-266256

**GENERAL TEAMSTERS LOCAL UNION NO.
386, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS**

Petitioner

DECISION AND DIRECTION OF ELECTION

On September 17, 2020, Petitioner General Teamsters Local Union No. 386, International Brotherhood of Teamsters (Petitioner or Union) filed the instant petition under Section 9(c) of the National Labor Relations Act (the Act) seeking to represent a unit of employees employed by West Agro, Inc., d/b/a DeLaval Manufacturing (Employer) employed at the Employer's facility in Turlock, California (Employer's facility).¹ There are 10 employees in petitioned-for bargaining unit.

The appropriateness of the bargaining unit is not in dispute. A hearing was held before a hearing officer of the National Labor Relations Board (Board) on October 7 to allow the parties to present their position regarding whether the election should be held manually at the Employer's facility or by mail ballot, given the COVID-19 pandemic. Petitioner seeks a mail or manual election to take place at the soonest practicable date, and the Employer also seeks a manual election.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. Based on the entire record in this proceeding, relevant Board law, and the extraordinary circumstances of the COVID-19 pandemic I shall direct a mail-ballot election.

FACTUAL OVERVIEW AND THE POSITIONS OF THE PARTIES

The Employer's facility manufactures chemicals for agriculture and industrial use. The Employer's facility consists of perimeter fence with gate enclosing parking lots, a maintenance shed and a large, 150,000 square building that contains production areas, a loading dock, office space, and storage areas. Production employees work primarily in a large shop floor area that is subdivided into smaller production areas. The Employer employs 10 employees in the petitioned-for classifications: six production workers, two

¹ All dates 2020 unless otherwise indicated.

warehouse workers, a maintenance technician, and a one employee in the blender/filler position. The production workers at issue in the instant case are scheduled on the day shift.

Many aspects of the COVID-19 pandemic, the importance of social distancing, wearing face coverings, and limiting interpersonal contact, are now well-known realities of life in California and throughout the United States. The Centers for Disease Control and Prevention (CDC), has determined “[t]he best way to prevent illness is to avoid being exposed to the virus,” as there is currently no approved vaccine or antiviral treatment, and “[m]inimizing person-to-person transmission of SARS-CoV-2 is critical to reducing the impact of COVID-19.”² According to the CDC, “[t]he virus that causes COVID-19 is spreading very easily and sustainably between people” and “the more closely a person interacts with others and the longer that interaction, the higher the risk of COVID-19 spread.”³ Many of the measures recommended by the Federal, state, and local governments to prevent the spread of the virus are well-known at this point: avoid social gatherings, avoid discretionary travel, practice good hygiene, maintain at least a 6-foot distance between individuals, and use cloth face coverings when around other people.⁴

Although it has not directly addressed Board elections, the CDC has issued guidance on elections in general. Its *Considerations for Election Polling Locations and Voters* states officials should “consider offering alternatives to in-person voting if allowed” and that “[v]oting alternatives that limit the number of people you come in contact with or the amount of time you are in contact with others can help reduce the spread of COVID-19.”⁵ The CDC further states the virus can survive for a short period on some surfaces and that it is possible to contract COVID-19 by touching a surface or object that has the virus on it and then touching one’s mouth, nose, or eyes,” but “it is unlikely to be spread from domestic or international mail, products or packaging.”⁶

² CDC, *Protect Yourself* (updated September 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>; Department of Homeland Security, *Predicting the Decay of SARS-CoV-2 in Airborne Particles* (July 16, 2020), <https://www.dhs.gov/publication/st-predicting-decay-sars-cov-2-airborne-particles-factsheet>.

³ CDC, *How it Spreads* (updated October 5, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

⁴ CDC, *Protect Yourself* (updated September 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

⁵ CDC, *Considerations for Election Polling Locations*, (updated June 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (“Elections with only in-person voting on a single day are higher risk for COVID-19 spread ...”); see also California Office of the Governor of the State of California, *Executive Order N-64-20* (May 8, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/05/05.08.2020-EO-N-64-20-signed.pdf> (“WHEREAS to preserve public health in the face of the threat of COVID-19, and to ensure that the November election is accessible, secure, and safe, all Californians must be empowered to vote by mail, from the safety of their own homes ...”).

⁶ CDC, *Frequently Asked Questions, Am I at risk for COVID-19 from mail, packages, or products?* (updated October 9, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>.

To avoid the unlikely possibility of contracting COVID-19 through the mail, the CDC simply advises: “After collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol.”⁷

Turlock is located in Stanislaus County, California and is approximately 100 miles from the Regional office in Oakland, California. As of October 20, Stanislaus County has recorded 17,342 cases of COVID-19, and 392 deaths among its residents.⁸ Under California’s four-phase reopening plan Stanislaus is currently in the second-highest category, “substantial,” and under this designation California regulations require that some non-essential indoor businesses remain closed.⁹

In order to address the health risks raised by an in-person election, the Employer proposes conducting a manual election with a one-hour voting period in the upstairs conference room, an unused room at the facility, approximately 17 by 14 feet in size and separated from the shop floor. As proposed by the Employer, voters would access the polling place by entering a hallway near the front door of the facility, proceeding up a flight of stairs, and then using another hallway to access the room where the polling place would be located. This room has two doors, and after voting the voters would exit by a separate door designated as the exit. The Employer maintains the polling place allows sufficient space for the Board agent conducting the election, observers, and the voter to maintain six feet of separation at all times.

The Employer maintains that all employees are provided masks and gloves in the regular course of business, masks must be worn consistent with California regulation, although glove use is optional. The Employer maintains a recent safety meeting was dedicated to reviewing COVID-19 precautions with employees, and that it has made some changes in the workplace, such as separating the tables in the break room so that they are separated by six feet of distance.

One employee has tested positive for COVID-19 during the pandemic, but that employee has since returned to work after a quarantine period. The record also mentions a second incident with a temporary worker, but the details of this situation are unclear. While the specific timing of these incidents is not included in the record, it does appear they were earlier in the year, perhaps in May. The Employer’s facility is not open to the public and does not have regular visitors, except truck drivers delivering and picking up materials from the facility. The Employer maintains these drivers typically remain with their vehicle and do not circulate in the facility.

⁷ CDC, *Running Errands* (updated September 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html>.

⁸ <https://covid19.ca.gov/state-dashboard/>.

⁹ *Id.*; California Department of Public Health, *Blueprint for a Safer Economy* (updated October 20, 2020), <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID19CountyMonitoringOverview.aspx>.

BOARD'S STANDARD

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives, and the Board in turn has delegated the discretion to determine the arrangements for an election to Regional Directors. *San Diego Gas and Elec.*, 325 NLRB 1143, 1144 (1998); citing *Halliburton Services*, 265 NLRB 1154 (1982); *National Van Lines*, 120 NLRB 1343, 1346 (1958); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). This discretion includes the ability to direct a mail ballot election where appropriate. *San Diego Gas & Elec.* at 1144-1145. Whatever decision a Regional Director does make should not be overturned unless a clear abuse of discretion is shown. *National Van Lines* at 1346.

The Board's longstanding policy is that elections should, as a rule, be conducted manually. *National Labor Relations Board Casehandling Manual Part Two Representation Proceedings*, Sec. 11301.2. However, a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. *Id.* This includes a few specific situations addressed by the Board, including where voters are "scattered" over a wide geographic area, "scattered" in time due to employee schedules, in strike situations, or other extraordinary circumstances. *San Diego Gas*, supra at 1145.

On May 8, the Board, in an Order denying a request for review in *Atlas Pacific Engineering Company*, Case 27-RC-258742, addressed a mail ballot determination in the context of the COVID-19 pandemic. In its footnote to that Order, the Board noted that *San Diego Gas* contemplated "extraordinary circumstances" beyond the considerations described above, and that circumstances in place at the time – federal, state, and local government directives limiting nonessential travel, requiring the closure of nonessential businesses, and the Regional office conducting the election on mandatory telework – constituted a valid basis for directing a mail ballot election in that case after considering the conditions surrounding a manual election.

On July 6, the General Counsel issued a memorandum titled "Suggested Manual Election Protocols." *Memorandum GC 20-10*. In that memo the General Counsel reiterated that Regional Directors have the authority, delegated by the Board, to make "initial decisions about when, how, and in what manner all elections are conducted." The General Counsel further noted Regional Directors have, and will:

make these decisions on a case-by-case basis, considering numerous variables, including, but not limited to, the safety of Board Agents and participants when conducting the election, the size of the proposed bargaining unit, the location of the election, the staff required to operate the election, and the status of pandemic outbreak in the election locality.

The memorandum then addressed suggested election mechanics, certifications and notifications required to verify a safe election can occur, and the need to include election arrangements in an election agreement. The memo concludes with additional notes regarding the assignment and travel of Board Agents.

DETERMINATION

The Board's preference for in-person elections is well-established, and I agree with the Employer in this regard. However, in the midst of a pandemic, where person-to-person contact has potentially deadly consequences, it is necessary to examine in each instance whether an election can be conducted safely or whether the Board's mail ballot procedures are best utilized. Thus, it is my obligation to conduct an election in this matter at the earliest practicable time and in the most responsible and appropriate manner possible under the circumstances.

I acknowledge that, absent the public health concerns arising from the pandemic, I would almost certainly agree to conduct a manual election in this case for many of the reasons the Employer identifies. The election at issue involves a relatively small number of employees, at one facility, employed on a single shift. However, because of the COVID-19 pandemic this election is not taking place under normal circumstances. Stanislaus County has experienced a significant number of COVID-19 cases, and according to the State of California the amount of COVID-19 in the county remains "substantial." Although the pandemic is no longer a new or recent condition this familiarity does not diminish the risk posed by gatherings as COVID-19 remains a potentially deadly disease that is transmitted by close personal contact. For this reason, current Federal and California public health guidance continue to strongly recommend discouraging gatherings and unnecessary travel to reduce the risk of exposure to and spread of COVID-19. I find the risks posed by the continuing pandemic present extortionary circumstances and, because a mail ballot election is the safest method of conducting an election, a mail ballot election appropriate.

I acknowledge that the Employer has proposed some precautions to reduce the risks associated with a manual election, proposing a time and place for an election and generally committing to follow the recommendations made in *Memorandum GC 20-10*. I further recognize that these recommendations attempt to incorporate virtual aspects to the extent possible, such as a holding the pre-election conference by videoconference. A manual election that includes these provisions is no doubt safer than if no precautions were put in place, but a manual election still requires that a Board Agent travel from Oakland to Turlock, located in a county at substantial risk, likely in the Fall month of November and then conduct an election that requires observers and voters to congregate in an enclosed space with dimensions of only 17 x 14 feet. The risks associated with this conduct at a facility that has reported at least one, if not two COVID-19 cases, can be mitigated, but not eliminated. I am not persuaded that when

the Board has a procedure for conducting an election that is available and *not* include these risks, I should proceed in that matter simply because it is the Board's traditional way of conducting an election. As noted, the present circumstances are extraordinary, and I conclude a mail ballot election is accordingly the appropriate choice.

CONCLUSIONS

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.¹⁰
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a voting group appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time Production Workers, Maintenance Technicians, Warehouse Workers, and Blender/Fillers employed by the Employer at its facility located at 1298 South Walnut Rd., Turlock, CA 95380;

Excluded: All Production Support employees, Quality Assurance Engineers, Laboratory Technicians, Purchasing Specialists, Shipping and Receiving Coordinators, confidential employees, office clerical employees, guards, and supervisors as defined in the Act.

¹⁰ During the hearing the parties stipulated to the following commerce facts: West Agro, Inc. d/b/a DeLaval Manufacturing, a Delaware corporation, with an office and place of business located in Turlock, California, is engaged in the business of chemical manufacturing for agriculture and food processing. During the last twelve months, the Employer has purchased and received goods valued in excess of \$50,000 from suppliers located outside the State of California.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by GENERAL TEAMSTERS LOCAL UNION NO. 386, INTERNATIONAL BROTHERHOOD OF TEAMSTERS.

A. Election Details

I have determined that a mail ballot election will be held. Petitioner has waived the ten days it is entitled to have the voter list described below.

The ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At **5:00 p.m. on November 3, 2020**, ballots will be mailed to voters from the National Labor Relations Board, Region 32, 1301 Clay Street, Suite 300N Oakland, CA 94612-5224. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **November 10, 2020**, should communicate immediately with the National Labor Relations Board by either calling the Region 32 office at (510)637-3300, or Nicholas L. Tsiliacos at (510) 671-3046, and request a ballot.

All ballots will be commingled and counted at the Regional Office on November 18, 2020.¹¹ In order to be valid and counted, the returned ballots must be received in the Regional Office prior to the counting of the ballots.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **October 23, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to

¹¹ If, on the date of the count, the Regional Office is closed, or the staff of the Regional Office is working remotely, the count will be done remotely. If the Regional Director determines this is likely, a reasonable period before the count, the parties will be provided information on how to participate in the count by videoconference.

vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(I) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **October 29, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated at Oakland, California this 27th day of October 2020.

/s/ Valerie Hardy-Mahoney

Valerie Hardy-Mahoney
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